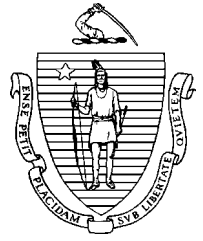




Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-94-11

FACTS:

You are seeking an opinion on behalf of a member of the board of trustees (Board) of a state college (College).

The College is a state agency of higher education, created and placed under the control of its Board by statute. This section gives broad authority to the Board by granting to it “all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing board of institutions of higher learning.” *Id.* This section further provides that “[i]n exercising such authority, responsibility, powers and duties said board shall not in the management of the affairs of the university be subject to, or superseded by, any other state agency, board, bureau, commission, department or officer, except as provided by law (cites omitted). Two members of the Board shall be full-time students elected by the student body, and seventeen members shall be appointed by the Governor. At least five such gubernatorial appointees shall be alumni, and one shall be a representative of organized labor. Members of the Board serve without compensation and are special state employees. If any member is absent for four regular meetings in any calendar year, exclusive of July and August, his office as member of the Board shall be deemed vacant. Upon notification by the chairperson to the Governor that a vacancy exists, the Governor shall appoint a new member from a list of names provided by the public education nominating council established by statute.

The Board has oversight responsibilities for all programs within the College. Board members will be involved in discussions and meetings and will ultimately vote on the future of one campus, to be hereinafter known as ABC. Preliminary discussions have begun regarding the possible merger of ABC with one or more area private corporate entities.

One member of the Board is also an uncompensated member of the board of directors of a private corporation, hereinafter known as XYZ. XYZ is also considering possible affiliations with the same private corporate entities. If XYZ affiliates with one corporation, it could be considered a competitor of ABC. Discussions at board of trustees’ meetings may involve information regarding possible mergers and affiliations by these respective boards with private entities.

QUESTIONS:

1. Does §6 of the conflict law prohibit the Board member from participating in Board meetings, discussions or votes concerning the possible merger or affiliation of ABC with the private entities described above?

2. If so, does §6 require that the Board member abstain and notify the Governor, his appointing authority, and this Commission of the nature and circumstances of the particular matter and the financial interest that requires the Board member’s abstention?

ANSWERS:

1. Yes.

2. No, because the Board member is not “otherwise required to participate” in any matter pending before the Board.

DISCUSSION:

Section 6 of the conflict law prohibits a state employee from participating^{1/} in a particular matter^{2/} in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or reasonably foreseeable financial interest. The financial interest implicated by §6 may be of any size, and may be positive or negative, so long as the financial interest is “either direct, or, if indirect, reasonably foreseeable.” *EC-COI-89-33*. Financial interests that are remote, speculative, or not sufficiently identifiable do not require abstention. *EC-COI-89-19; 87-16; 84-98*. We have said that we will decide on a case-by-case basis whether a financial interest is reasonably foreseeable. *EC-COI-89-33*.

Unquestionably XYZ has a financial interest in its own Board’s decision whether or not to affiliate with another private corporate entity. However, §6 concerns the Board member’s official participation, not actions which he may or may not take in his private dealings. Consequently, we must determine whether XYZ also has a financial interest in the *Board’s* decision whether or not to cause ABC to merge or affiliate with a private corporate entity. We conclude that XYZ does have a reasonably foreseeable financial interest in such decisions of the Board.

In previous opinions, we have said that the prohibition on one’s official activities in §6 extends to include voting on matters affecting a competitor’s financial interests. Thus, for example, we have said that §6 prohibits a state employee, who is also an officer, director, trustee, partner or employee of an organization, from participating officially with regard to applications for funding submitted by competitor organizations, because such participation gives the state employee “the opportunity to advance the financial interests of [his] own organization at the expense of [his] organization’s competitors.” *EC-COI-81-118*. We found that §6 is particularly applicable where the competition is over a limited pool of resources. Here, ABC and XYZ are or are likely to be competitors for the same opportunity to affiliate with a finite number of similarly situated private entities. Accordingly, XYZ, as a competitor of ABC, has or is likely to have a financial interest in the Board’s consideration of ABC’s options in this regard. Therefore, as an officer of XYZ, §6 prohibits the Board member from participating officially in matters in which XYZ has a financial interest. Although we recognize that the precise nature of XYZ’s financial interest in such matters cannot now be identified, we think that the existence of such financial interest is obvious, and that when coupled with the potential for conflicting allegiances presented by these facts, amply supports the conclusion that the Board member ought to abstain.^{3/}

Having concluded that §6 requires the Board member’s abstention, we go on to consider whether, in addition, the Board member must notify his appointing authority, the Governor, and this Commission “of the nature and circumstances of the particular matter and make full disclosure of such financial interest ... “ G.L. c. 268A, §6. We conclude that disclosure is not required.

Section 6 provides, in relevant part: “Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest...” Upon receiving such disclosure, the appointing official may assign the particular matter to another employee, or assume responsibility himself, or make a written determination that the state employee may participate because the employee’s interest is not so substantial as to affect the integrity of his services to the Commonwealth. You have asked us to determine whether the Board member’s duties are such that they “otherwise require him to participate in” Board matters of the kind here at issue. In making

this determination, we look first to the language of the statute.

The disclosure requirements in §6 are triggered if the public employee's "duties would . . . require him to participate." G.L. c. 268A, § (emphasis supplied). Thus, it is apparent that the word "required" must be read in conjunction with the word "duties." "Duty" is defined as: "Obligatory conduct or service" or "Mandatory obligation to perform." *Black's Law Dictionary 453* (5th ed. 1979). We conclude that "duties which would require" a public employee's participation, are those actions which are within such employee's "mandatory obligation to perform". Such a situation is presented, for example, where a matter is specifically assigned to a state employee such that she must either perform the work herself or delegate the task to another to be performed. See, e.g., *EC-COI-90-5*. In either case, the employee's duties "require" her participation, i.e., participation is mandatory, since she may not simply do nothing, but must elect to either perform the task herself or reassign it to another. See, e.g., *EC-COI-86-13* (assignment of a matter is participation within meaning of §19, the municipal counterpart to §6).

By contrast, a member of a Board or Commission may abstain from participating in a particular matter for reasons other than an actual or potential conflict of interest, e.g., where a Board member abstains from participation because legitimately undecided on the issue or for reasons of conscience. Such Board member, we think, cannot be compelled to participate notwithstanding his desire to abstain, as his participation in the matter is discretionary. That is, while participation by all Board members present and capable of voting may be the expected or preferred course of action, each Board member is nevertheless free to abstain. Therefore, we conclude that since an individual Board member's duties do not "require" that member to participate in any particular matter, such Board member may simply abstain from all participation in the matter without giving notice to his appointing authority and this Commission.

The conclusion we reach here is also consistent with the policy behind §6. By its terms, the vice which §6 is designed to guard against is "participation" in a matter affecting financial interest, i.e., self-dealing. Where there is no self-dealing (i.e., no participation), §6 is not triggered. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 Boston L. Rev. 299, 354 (1965) ("it is the act of public participation alone which constitutes the violation.") Early opinions of the Attorney General and the Commission are in accord. For example, in *Conflict Opinion No. 613*, the Attorney General concluded that §6 would not be applicable if the Board member did not participate, but that an exemption was required "should [the Board member] nevertheless wish to participate in the Board's activities." Similarly, in *EC-COI-79-61*, the Commission concluded that a Board member should not participate unless and until he complied with the disclosure requirements and obtained the written determination required by §6. However, the disclosure requirements in §6 were not triggered if the Board member simply abstained. We think that these opinions correctly reflect the policy of §6 particularly where, as in the case of a Board member, the public employee may effectively isolate himself from all participation in the matter.

We also note that where a Board member intends to abstain, resort to the disclosure requirements presents the appointing authority with two choices: he may assign the matter to another employee, or he may perform the task himself. You argue that each of these options is inappropriate here. We agree.

If disclosure were made here, the particular matter which the Governor would be asked to reassign or undertake himself is the Board member's decision-making functions, e.g., his vote. However, nothing in the applicable statute permits the Governor to replace a Board member except in the case of a vacancy. Thus, the Board member's decision-making functions cannot lawfully be assigned to another employee. Nor can the Governor assume responsibility for the matter himself as to do so would improperly subject the ABC's management to an officer (other than a Board member) in violation of that same statute. We have previously concluded that where disclosure is inappropriate or futile under the circumstances, §6 requires mere abstention. See *EC-COI-93-24* (member of the State Ethics Commission who performs a quasi-judicial function involving confidential information should simply abstain).

Finally, we are persuaded that nothing in the legislative history of §6 requires a different result. Our examination of that legislative history reveals that the “otherwise required” language in §6 is the result of a 1978 amendment to 268A, which arose out of the Common Cause initiative petition to create the Commission in c. 268B, and to amend certain sections of c. 268A. Prior to the 1978 amendment, the second paragraph of §6 provided an exemption to the employee who made a disclosure to his appointing authority and was given a written determination in advance that he could participate. Participation was also permitted if the financial interest was of a type exempted from §6 by “general rule or regulations approved by the attorney general.”

In 1978, Common Cause inserted the following language into its initiative petition (House No. 5151):

Any public official or public employee, who in the discharge of his official duties, would be required to take an action that would affect directly or indirectly a financial interest of himself, a member of his immediate family, or a business with which he is associated, shall take the following actions:

(a) Prepare a written statement signed under penalty of perjury describing the matter requiring action and the nature of the particular conflict; and

(b) Deliver a copy of the statement to the commission; and

(2) if he is not a member of a legislative or quasi-legislative body or an elected official, he shall deliver a copy of the statement to his immediate superior, if any, who shall assign the matter to another employee, or if he has no immediate superior, he shall take such steps as the commission shall prescribe or advise to remove himself from influence over actions and decisions on the matter.

House No. 5151 was assigned to a legislative committee together with related house and senate bills. What emerged was a new draft bill, S. 1540, which provided:

Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either

(1) assign the particular matter to another employee; or

(2) assume responsibility for the particular matter; or

(3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case the employee would not violate the first paragraph of this section by his participation in the particular matter. A copy of such written determination shall be retained by the employee for a period of six years after the termination of his involvement in the particular matter.

As currently enacted, §6 provides the same options as in S. 1540, but requires disclosure to the both the appointing authority and this Commission.

In our view, the primary purpose of the legislative change proposed in the Common Cause initiative petition was to expressly permit reassignment where a “public official or public employee, . . . in the discharge of his official duties, would be required to take an action” affecting particular financial interests. This option was not available under the prior §6. In committee, the legislature adopted this change, retained the option from the prior version allowing participation after disclosure to and a written determination from the appointing authority, and added a third option — the appointing authority could assume responsibility himself. However, the various bills are in accord that resort to these options is necessary only where the discharge of the public employee’s official duties requires him to take action. In other words, §6 applies only where some form of participation is unavoidable because the public official’s duties make his participation mandatory. Where, as in the case of the Board member, participation is not mandatory, the disclosure requirements in §6 are not triggered. Therefore, the Board member may simply abstain.

DATE AUTHORIZED: December 14, 1994

^{1/} “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{2/}“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{3/}Moreover, as you note, XYZ is a provider of insurance to consumers throughout the state including, presumably, users of a college’s facility and at similar facilities located in the area served by the College facility. Given this fact, we recognize the likelihood that XYZ also has a financial interest in ABC’s plans because of the effect such plans may have on costs borne by XYZ as a result of expanded (or contracted) services in that area. Additionally, we note that §6 may also be implicated by other Board decisions regarding ABC that have a direct or reasonably foreseeable impact on XYZ’s financial interest. However, we have no facts at this time on which to base such a determination.